Philadelphia Parkway, (1915), 250 Pa. 257; *Dintman* v. *City of Harrisburg*, (1919), —— Pa. ——, 108 Atl. 724, 725.

See for full discussion of recent cases on zoning, 19 MICH. L. REV. 191.

H. L. W.

CONCURRENT POWER UNDER THE EIGHTEENTH AMENDMENT.—The two main questions which have been considered in making the decisions under the Eighteenth Amendment are whether or not state provisions for referendum of legislative action can be applied to ratification of proposed amendments to the Federal Constitution, *Hawke* v. *Smith*, (1920), 251 U. S. ——, 40 Sup. Ct. 495, and what the interpretation of the second section of the amendment is to be, in giving the states 'concurrent power' to enforce the Amendment by legislation, along with Congress. *State of Rhode Island* v. *Palmer*, (1920), 40 Sup. Ct. 486. *Hawke* v. *Smith* reversed the decision (below) in the Ohio Supreme Court, 126 N. E. 400, which had held that the referendum applied. See note on the decision in the Ohio court in 18 MICH. L. REV. 698. The Supreme Court decided that the fifth Article of the Constitution, providing for methods of amendment, is a grant of authority by the people to Congress; hence, the authority given to the state legislatures to ratify is given to specific bodies as an expression of assent, rather than legislative action, so that the referendum cannot apply. See a forecast of this view in a Note and Comment in 18 MICH. L. REV. 51. *Davis* v. *Hildebrant*, 241 U. S. 565, which held that the referendum provision of the state constitution applied to a law redistricting the state with a view to representation in Congress was distinguished on the ground that that was legislative action by the state, to which the referundum properly applied. For an exposition of the cases of *Hawke* v. *Smith* and *Rhode Island* v. *Palmer*, *supra*, see article by Thomas R. Powell, "Constitutional Law in 1919-1920," 19 MICH. L. REV., pp. 2-8. On the Eighteenth Amendment as a whole, see article by George D. Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," 18 MICH. L. REV. 213.

In *Rhode Island* v. *Palmer*, the opinion of the Court gave no reasons for the decision, setting a new precedent in giving practically a memorandum opinion in a case of wide importance. It held that the words 'concurrent power' do not mean joint power, nor that legislation by Congress must be approved by the states, nor that the power should be divided between Congress and the several states along the lines of activity in inter and intra-state commerce regulations.

Justice McKenna, in a separate opinion, interprets section 2 of the Amendment to mean 'coincident or united action'; there must be concordant action in Congress and the states, and he looks hopefully to the sentiment which produced the Amendment to give harmonious legislation in Congress and the states. The giving of concurrent power to both Congress and the states expressly is entirely new in the Constitution. Any argument must necessarily be based on more or less remote analogy. Perhaps concordant action as demanded by Justice McKenna is possible. In *Ex parte Siebold*, 100 U. S. 371, at page 391, Justice Bradley, in discussing the power given to the states

to prescribe election laws, and that of Congress to make or alter them, says "the more general reason assigned, to-wit, that the nature of sovereignty is such as to preclude the joint cooperation of two sovereigns even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and state governments in the election of representatives. It is at most an argument *ab inconveniente.*" Of course, the provision that Congress can *alter* regulations makes it paramount over the states. And see *Sowles* v. *Witters,* 46 Fed. 499, where a United States statute authorized Federal Courts to adopt judgment remedies of the state in which it is located, and that such then become United States Laws. A difficulty of adjustment, however, if concordant action is required, is indicated in *Boston & M. R. R.* v. *U. S.,* 265 Fed. 578, in which it was contended that a Federal statute on taxing of corporations should get its interpretation of certain words from the state statute on the subject. It was said that if this principle were accepted, "the general government would be forced to adopt different standards and differing rules of taxation among the states, varying in accordance with the differing statutes." The objection of Justice White, however, that to require concurrent action is to practically nullify the Amendment, since until such action is taken prohibition is a dead letter, seems unanswerable.

The Chief Justice, objecting both to a requirement of concordant action and to Congress' being paramount, where they both act, seems to hold that Congress and the states have independent powers. The cases before the Court in the Rhode Island decision were cases of injunctions against the enforcement of the Volstead Act, passed by Congress in accordance with section 2. Two cases came up subsequently to the Rhode Island decision, one in a Federal District Court, *Ex parte Ramsay,* 265 Fed. 950 (Fla.); and *Commonwealth* v. *Nickerson,* 128 N. E. 273 (Mass.), on indictments under state statutes which had been passed before the Volstead Act. In both cases it was held that the fact that the state statutes antedated the Volstead Act made no difference in the situation, and in both cases the indictments were sustained. In *Ex parte Ramsay, supra,* the indictments were under a statute passed to enforce a state constitutional prohibition provision. It was held that since the state statute made substantially the same thing unlawful that the Volstead Act did, there was no conflict, although the penalties provided by the state act were more severe than those provided by the Federal Act. "Surely a state could pass legislation for the purpose of carrying out the Amendment under the authority given in the Amendment itself, which was not in violation of any provisions of the Volstead Act." It would seem to follow that if the statute had been in violation of the Volstead Act, it would have fallen. In *Commonwealth* v. *Nickerson, supra,* Chief Justice Rugg gives an exhaustive discussion of the possibilities of concurrent action. The defendant was charged with selling liquor without a license, contrary to the provisions of the state statute. The question was as to the validity of the statute since the Eighteenth Amendment and the Volstead Act. It was held that so much of it as allowed sales under a license fell after the Amendment, but that the rest of the statute was enforceable, since it did not conflict with the Volstead

Act; that powers of the state and of Congress may be given different manifestations if not in collision with one another, in which case state legislation must yield; and a state statute could not authorize what Congress forbids. These decisions seem sound, and seem to avoid any suggestion of a 'states' rights' interpretation. Justice Rugg discards the meaning of 'concurrent' as given in cases between states exercising concurrent jurisdiction over the river running between them; *Wedding* v. *Meyler,* 192 U. S. 573; *Neilson* v. *Oregon,* 212 U. S. 315. The latter case held that an act done on the river within the boundaries of one state and allowed by that state cannot be prosecuted by the other state. Justice McKenna found an analogy here for action under the Eighteenth Amendment; but one outstanding difficulty seems to be that states are equal powers, while the United States and any one state can scarcely be held to be equal sovereignties. Moreover, Justice Brewer in the latter case said that the object of giving concurrent jurisdiction was to avoid nice questions as to whether a criminal act sought to be prosecuted was committed on one side or the other of the river; it was expressly not decided whether, in the entire absence of legislation by one state the other could enforce its statute anywhere on the river, nor whether prosecution must be by both states jointly.

The Rhode Island decision expressly held that 'concurrent power' did not mean that power divided between Congress and the states along lines which separate interstate commerce from intrastate affairs; yet cases concerning this division furnish a helpful analogy, in concurrent power. *Chicago, Milwaukee & St. Paul R. Co.* v. *Solan,* 169 U. S. 133; *Lake Shore & Mich. Southern R. Co.* v. *Ohio,* 173 U. S. 285; see *Richmond & A. R. Co.* v. *R. A. Patterson Tobacco Co.,* 169 U. S. 311. In *Lake Shore & M. S. R. Co.* v. *Ohio, supra,* Justice Harlan said, "This power in the states is entirely distinct from any power granted to the general government, although, when exercised, it may sometimes reach subjects over which national legislation can be constitutionally extended." *Gilman* v. *Philadelphia,* 3 Wall. 713, recognizes concurrent power in the states in all cases except where power is exclusively in the Federal Constitution, expressly prohibited to the states, and where in the nature of things it must be exercised by the national government exclusively. The building of a bridge across a navigable river was held to be within this reserved power of the state. Where Congress has not controlled state legislation in this field, the state, within certain limits, is supreme. *Willson* v. *Blackbird Creek Marsh Co.,* 2 Pet. 245. Where the powers clash, Congress is paramount, *Sinnot* v. *Davenport, 22* How. 227. It would seem that the Eighteenth amendment has given the states further power than they have in their reserved police powers touching interstate commerce; in that they have power over importations. But this seems to be more a difference of degree than of kind, and an analogy seems possible.

One difficulty seems to lie in the fact that 'concurrent' is assumed to mean the same thing as 'equal.' That it does not mean that is tacitly recognized in *Ex parte Ramsay* and *Commonwealth* v. *Nickerson, supra.* To waive completely the analogy found in the cases where states have exercised their reserve powers, 'concurrent' at least in a sense, simply because the analogy is not perfect, seems a species of legalistic reasoning. It was undoubtedly meant

by the second section of the Amendment to make the enforcement of it as effective as possible, by giving the states concurrent power. It is not conceivable that it was intended to assert anew a 'states' rights' doctrine. In cases in which, heretofore, the states have had reserved powers, Congress, where it invades those powers, where permitted to enter the field, has been considered paramount, and it is doubtful if the framers of the Amendment intended to break away from this precedent and make the power of the states equal to that of Congress, although independent. It would seem that there must be a clear repugnancy where the principle of supremacy is applied; see *Sinnon* v. *Davenport, supra,* at page 243. Not to hold Congress supreme in case of a clash would certainly nullify the amendment. The two decisions *supra* of *Ex parte Ramsey* and *Commonwealth* v. *Nickerson* seem to have pointed the way which interpretation is bound to take. G. D. C.